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Supreme Court of the United States

OCTOBER TERM, 1949

No._____

RACHEL V. SMITH MCDANIEL, AND HER HUSRAND, GEORGE M. MCDANIEL, *Petitioners,*

v.

CALIFORNIA-WESTERN STATES LIFE INSURANCE COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Rachel V. Smith McDaniel and her present husband, George M. McDaniel, respectfully petition this Honorable Court for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and would respectfully show:

I.

Summary Statement of the Case

On March 6, 1947, Roy Lee Smith, the insured (R. 24) the then husband of Petitioner, Rachel V. Smith McDaniel,

made his application to Respondent for life insurance on Endowment at 65, 20 premiums plus 20 year F.I.R. 2%, participating. Premiums payable monthly. Plan of insurance (as given in rate book) (R. 22) in the amount $20.00 a month will buy (R. 21). This application was made on the form prepared and used by Respondent and showed that insured was not a pilot, that he had made 30 aerial flights during the preceding 12 months and contemplated 25 flights during the next year (R. 21). The application further provided, just above insured's signature:

> "4. That if the Company does not issue policies on the basis applied for, or at the Company's published premium rates corresponding to the applicant's age and classification, this application shall be for the amount, the plan, the Additional Benefits and the Accident and Health Insurance at the premium rates corresponding with the Company's valuation of the risk, if ratified by the acceptance and receipt of said policies, with any additions or amendments thereto which the Company has made and referred to, in the space entitled 'Additions or Amendments' ". (R. 24.)

As of April 10, 1947, Respondent issued its life insurance policy in the face amount of $5,105.00, but which had a commuted value as of the date of death of the insured of $21,603.80 (R. 82). Such policy, on numbered page 3 thereof, contained a provision as follows:

> "Policy And Application Is Entire Contract—
>
> "This policy and the application therefor (a copy of which application is attached hereto when issued) constitute the entire contract between the parties hereto. All statements of the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this policy, or be

used in defense of a claim hereunder unless it be contained in the written application therefor." (R. 39.)

Also Respondent had inserted, between the numbered pages of the policy, a piece of paper headed "Aviation Exclusion Clause" (R. 57 through first few lines of R. 60). This reference, however, is made for the purpose of showing that the so-called "Aviation Exclusion Clause" attempted to be inserted in the policy, was not signed by the insured and without admitting other contentions of Respondent in connection therewith. The so-called "Aviation Exclusion Clause" shown at page 197 of the record (offered R. 182) is not the one which was attempted to be attached to the policy, but is a piece of paper offered in evidence by Respondent and detached from any other piece of paper.

The insured met his death April 25, 1948, under the following circumstances: While riding in a Navy plane along with other Navy personnel, which plane was engaged in simulated anti-submarine warfare operations, the plane crashed at sea for causes undetermined, and a search by aircraft and surface craft instituted immediately thereafter indicated that the plane had disintegrated on impact with no possibility of survivors. There were no eye-witnesses, and the body was not recovered (R. 80).

Respondent denied liability on the policy, except for tender of return of premiums (R. 80), claiming that the aviation exclusion clause was a part of the policy (R. 79), and that insured met his death within the terms of such claimed "Aviation Exclusion Clause".

On the trial the essential facts were stipulated (R. 78 to 84); the trial was had to the Court without a jury and the Trial Court admitted for the record certain evidence offered by the parties over objection and which the Trial Judge really considered immaterial and inadmissible (R. 131, 138, 140, 160, 164, 166, 174, 178, 179).

The Trial Court filed Findings of Fact and Conclusions of Law (R. 86, 87 and R. 96-99), gave his opinion in letters written to the attorneys (R. 88-91), and rendered judgment denying Petitioners any recovery except for the return premiums tendered (R. 91, 92).

The Court of Appeals affirmed the judgment of the Trial Court (R. 222). The Court of Appeals held that the "Aviation Exclusion Clause" was a part of the policy and that the insured met his death within its terms (R. 218).

II.

Jurisdiction

The date of the judgment to be reviewed was May 2, 1950 (R. 222). A Motion for Rehearing in the Court of Appeals (R. 223-233) was overruled May 23, 1950 (R. 234). This Court has jurisdiction because the Court of Appeals for the Fifth Circuit has decided an important question of local law in a way probably in conflict with the applicable local decision, has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, and has failed to give proper effect to an applicable decision of this Court (Supreme Court Rules 38, Sec. 5) and the jurisdiction of this Court is involved under Sec. 1254 (1), Title 28, U. S. CODE.

III.

The Questions Presented

The principle question here presented is whether an insurance company can, in any event, make an "Aviation Exclusion Clause" a part of a life insurance policy when such

a clause has not been applied for by the insured, and the application form prepared and provided by the insurance company contains a provision:

> "That if the Company does not issue policies on the basis applied for, or at the Company's published premium rates corresponding to the applicant's age and classification, this application shall be for the amount, the plan, the Additional Benefits and the Accident and Health Insurance at the premium rates corresponding with the Company's valuation of the risk, if ratified by the acceptance and receipt of said policies, with any additions or amendments thereto which the Company has made and referred to, in the space entitled 'Additions or Amendments'."

and the Company has failed to comply with such provision and has further provided in the policy:

> "Policy And Application Is Entire Contract—
>
> "This policy and the application therefor (a copy of which application is attached hereto when issued) constitute the entire contract between the parties hereto. All statements of the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this policy, or be used in defense of a claim hereunder unless it be contained in the written application therefor."

and where there is nothing in the policy to indicate the assent of the insured to the inclusion of such an "Aviation Exclusion Clause".

Another question here presented is whether an insured can be held to have died within an exclusion (if there be one) from the general risk insured against when there is no positive proof introduced or offered by the insurer that the insured did die within such exclusion (if any).

IV.

Reasons Relied on for Allowance of Writ

This Court will take judicial notice that the issuance by insurers and the purchase by individual laymen, ignorant as to the practices and procedures of insurance companies, is commonplace and big business in the State of Texas and in the Nation. This Court will further take judicial notice that there is an increasing tendency, in recent years, on the part of insurers to complicate and put extra frills on the life insurance policies which they issue, and that there is also an increasing tendency on the part of the insurers to attempt to put certain exclusions and certain limits on liability in the policies which they issue.

Yet, and notwithstanding the importance of insurance in our economy and daily lives, this Honorable Court has not granted a petition for certiorari and recorded an opinion in a "Life Insurance Case" (as that phrase is commonly understood) during its last 11 terms (that is within the last 11 years) unless such an opinion might have been rendered during the October 1949 Term and not yet reported in a bound volume published by the Law Book Companies, with the exception of one or two War Risk Insurance cases to which the United States was a party.

1. No court in the United States, by a reported opinion, has passed upon the broad questions here presented, e.g., whether a life insurance company can, by a slip-shod method, contrary to the specific provisions of the application which it prepared, and contrary to the specific provisions of the policy itself, incorporate in the policy a provision limiting its liability and/or excluding a part of the general risk insured against.

2. The rule of law that an insurance contract, including the application when made a part thereof, will be construed most strongly against the insurer and most favorably to the insured, is a rule which is so well settled by the decisions of all courts that it does not require the citation of authorities. Yet, the Court of Appeals, in the instant case, in effect, construed the policy and application, particularly those parts thereof quoted above under the heading "The Questions Presented" most strongly for the insurer, the Respondent herein. In so holding the decision of the Court of Appeals for the Fifth Circuit, in the instant case, is in conflict with numerous decisions of all of the Courts of Appeal holding that an insurance contract will be construed most strongly for the insured.

3. The decision of the Court of Appeals is in conflict with the applicable local decisions on an important question of Local Law in that:

The Supreme Court of Texas, in the case of GODDARD v. EAST TEXAS FIRE INSURANCE COMPANY, 67 Texas 69, 1 S.W. 906, held that an insurer could not reduce or escape its liability for the general loss insured against by attaching to the policy, by means of mucilage, a rider, clause or provision, seeking or attempting to have that effect when such rider, clause or provision was not applied for and was not referred to in what was indisputably a part of the policy. This rule of law has now become elementary in Texas.

4. The decision of the Court of Appeals in the instant case is in conflict with the decision of this Honorable Court in STROEHMANN v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, 300 U.S. 435, 81 Law Ed. 732, whereby this Honorable Court held that an insurer must avail itself of the manner provided by itself to escape liability precisely and in minute detail as provided by itself.

5. Also, the Court of Appeals has, in the instant case, misinterpreted and misapplied the decision and holding of this Honorable Court in the case of BERGHOLM v. PEORIA LIFE INSURANCE COMPANY, 284 U.S. 489, 76 Law. Ed. 416.

Wherefore, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Fifth Circuit at New Orleans, commanding that court to certify and send to this Court for its review and determination, on a date certain therein to be named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 12,697, Rachel V. Smith McDaniel, and her husband, George M. McDaniel, Appellants, v. California-Western States Life Insurance Company, Appellee, that said judgment of said court may be reversed by this Honorable Court, and that petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

/s/ LLOYD E. ELLIOTT,

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Supreme Court of the United States

OCTOBER TERM, 1949

No._____

RACHEL V. SMITH MCDANIEL, AND HER HUSRAND, GEORGE M. MCDANIEL, *Petitioners*,

v.

CALIFORNIA-WESTERN STATES LIFE INSURANCE COMPANY, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

The Opinion of the Court Below

The opinion of the Trial Judge (R. 88-91) was delivered by letter and has not been reported. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 216-221) has not yet been officially reported.

II.

Jurisdiction

The basis upon which it is contended that this Court has jurisdiction to review the judgment is set forth under Paragraph 2 of the Petition to which reference is made.

III.

Statement of the Case

The statement of the case in the Petition For Certiorari is hereby adopted and made a part of this brief.

IV.

Specifications of Error

1. The Honorable Court of Appeals erred in failing to find, or include, as a material fact that the insured submitted an application to appellee on the form prepared and used by it, which application did not apply for an Aviation Exclusion Clause, and which application did contain a provision as follows:

> "That if the Company does not issue policies on the basis applied for, or at the Company's published premium rates corresponding to the applicant's age and classification, this application shall be for the amount, the plan, the Additional Benefits and the Accident and Health Insurance at the premium rates corresponding with the Company's valuation of the risk, if ratified by the acceptance and receipt of said policies, with any additions or amendments thereto which the Company has made and referred to, in the space entitled 'Additions or Amendments'," because such application is the basis of the contract.

2. The Honorable Court of Appeals erred in holding that "the Company authorized the issuance and delivery of the policy on the condition that an Aviation Exclusion Clause rider be attached to and made a part of the policy of contract" for the reason that the insurer, having provided a specific way in which it could approve and/or issue a policy

different from that applied for, or on certain conditions, by that part of its printed application form reading:

> "That if the Company does not issue policies on the basis applied for, or at the Company's published premium rates corresponding to the applicant's age and classification, this application shall be for the amount, the plan, the Additional Benefits and the Accident and Health Insurance at the premium rates corresponding with the Company's valuation of the risk, if ratified by the acceptance and receipt of said policies, with any additions or amendments thereto which the Company has made and referred to, in the space entitled 'Additions or Amendments'."

and having failed to comply with or take advantage of this specific manner provided by itself of authorizing the issuance of the policy applied for "on condition", the appellee, at most, only attempted to impose such condition, and did not succeed in imposing such condition.

3. The Honorable Court of Appeals erred in holding "It is without dispute that the policy, as finally approved and delivered to the insured, did contain such aviation exclusion clause, as required by the Company", for the reason that the mere physical attachment of a piece of paper purporting to be an Aviation Exclusion Clause does not and cannot have the effect of making the policy contain such Aviation Exclusion Clause in view of and in the face of the provision in the application (prepared by the insurer) reading:

> "That if the Company does not issue policies on the basis applied for, or at the Company's published premium rates corresponding to the applicant's age and classification, this application shall be for the amount, the plan, the Additional Benefits and the Accident and Health Insurance at the premium rates corresponding

with the Company's valuation of the risk, if ratified by the acceptance and receipt of said policies, with any additions or amendments thereto which the Company has made and referred to, in the space entitled 'Additions or Amendments' ",

and in view and in the face of the policy provision:

"Policy And Application Is Entire Contract—

"This policy and the application therefor (a copy of which application is attached hereto when issued) constitute the entire contract between the parties hereto. All statements of the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this policy, or be used in defense of a claim hereunder unless it be contained in the written application therefor."

4. The Honorable Court of Appeals erred in allowing it to, or making it, appear from the opinion, that in asserting that an aviation exclusion clause did not constitute a valid and effective part of the policy contract, petitioners relied wholly, or even principally, on the fact that the insured did not sign the so-called Aviation Exclusion Clause physically attached to the policy.

5. The Honorable Court of Appeals erred in holding that the same rule applies to the insured as to the insurer, for the reason that an insurance policy or contract is construed most strongly AGAINST the insurer and most strongly FOR the insured.

6. The Honorable Court of Appeals erred in considering for any purpose whatsoever the copy of the "Aviation Exclusion Clause" returned by its soliciting agent to respondent because of the policy provision:

"No such statement (of the insured) shall avoid this

policy, or be used in defense of a claim hereunder unless it be contained in the written application therefor"

and because of the parol evidence rule.

7. The Honorable Court of Appeals erred in holding, inferentially, that it could, would and did, speculate and indulge inferences that insured met his death "as a result of travel or flight in, or upon any kind of aircraft, or from falling or otherwise descending therefrom or therewith DURING said travel or flight" and in no other way, for the reason that the burden of proof that an insured died within an exclusion to a life policy is on the insurer.

V.

Summary of the Argument

The holding of the Court of Appeals that the piece of paper headed "Aviation Exclusion Clause", claimed by Respondent to have been a part of the insurance contract, was a valid part of the policy contract is clearly erroneous in view of every principle of law, as established by decisions of this Honorable Court, the decisions of the various Courts of Appeal, and as established by the decisions of the courts of the State of Texas, and as dictated by the provisions of the application and those parts of the insurance policy which are admitted and conceded by all parties to contitute the contract. This is true even though no court by a reported opinion has ever passed upon whether or not a so called "Aviation Exclusion Clause" constituted a valid part of a life insurance policy, when it was claimed by the insurer to be a valid part of the policy, and when it was claimed by the insured (and the beneficiary) not to be a valid part of the policy. Of all of the innumerable cases examined, the

cases of STROEHMANN v. MUTUAL LIFE INSURANCE COMPANY, 300 U.S. 435, 81 Law Ed. 732, and GODDARD v. EAST TEXAS FIRE INSURANCE CO., 67 Tex. 69, 1 S.W. 906, are nearest in point on the facts of the instant case.

Even if it be finally held that such "Aviation Exclusion Clause" was a valid part of the insurance policy, which is not admitted, then the holding of the Court of Appeals that the insured died within the terms of such exclusion is contrary to the rules of law recognized and laid down in BULL v. SUN LIFE INSURANCE CO., 141 Fed. (2d) 456, 155 A.L.R. 1014, including the well recognized rule of law in Texas that the burden of proof is on the insurer to show that the insured met his death by reason of some clause excepted from the general hazard insured against, and including the principle of law recognized by the Texas Courts that neither party to a stipulation can enlarge upon or draw any inferences from it.

Argument

1. Argument is first made on the 6th specification of error. The Honorable Court of Appeals said: "We cannot ignore * * * the aviation exclusion clause which the insured returned to the company as a part of the contract * * * " (R. 219), and in so doing held that a piece of paper half way across the continent from the insurance policy was a part of the policy. In so holding, the Court of Appeals committed error in that such court wholly disregarded and ignored that provision of the policy contained on page numbered 3 thereof "no such statement (of the insured) shall avoid this policy or be used in defense of a claim hereunder unless it be contained in the written application therefor." (R. 39.)

Such holding of the Court of Appeals was also erroneous

in view of the provision of Art. 5053 R. C. S. of TEXAS, reading: "Nor shall any such company or agent thereof make any contract of insurance or agreements as to such contract other than as expressed in the policy issued thereon". Also, the applicable Texas authorities hold that a contract may not be modified, varied or contradicted by an extraneous writing. See GUARANTY LIFE INS. CO. v. DAVIDSON, ET AL. (Tex. S. Ct.), 234 S.W. 883.

Also in this regard, the opinion of the Court of Appeals on the parole evidence rule is in conflict with opinions of the same Court of Appeals and other courts of appeal, as well as the Supreme Court of the United States. PACIFIC MUTUAL LIFE INS. CO. OF CALIF. v. BARTON, ET AL. (5th Cir.), 50 F. (2d) 362; N. Y. LIFE INS. CO. v. HORTON (5th Cir.), 9 F. (2d) 320; AMERICAN CRYSTAL SUG. CO. v. NICHOLAS, 124 F. (2d) 477; LEITHAUSER v. HARTFORD INS. CO., 78 F. (2d) 320, certiorari denied, 56 S. Ct. 249, 80 L. Ed. 459.

2. Argument is next made on the 5th specification of error. The Honorable Court of Appeals in its opinion said: "We think fairness requires that the same rule be applied to the insured here" (R. 220); and in so holding committed error in that the principle of law that an insurance contract will be construed most favorably to the insured and most strongly against the insurer has been well established by all courts of record in the United States. This principle of law is so well established, with hardly a dissent, that citation of authorities is restricted to:

35 Federal Digest 219;
22 Texas Digest 155;
Aetna Ins. Co. v. Rhodes, 170 F. (2d) 111;
Aschenbrenner v. U. S. F. & G. Co. (U. S. Sup. Ct.), 54 S. Ct. 590, 78 L. Ed. 1140, 1141.

In fact, the language of the court in the ASCHENBRENNER case is quoted with approval by CHIEF JUSTICE VINSON in UNITED STATES v. ZAZOVE, 334 U.S. 602, 611; 92 L. Ed. 1601, 1607. This is one of the few cases wherein this Honorable Court has even discussed the principle of law applicable to life insurance companies within the last 11 years, as hereinbefore pointed out. Such quoted language of this court is as follows:

> "The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted * * * and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports."

3. Argument on the first four specifications of error is now grouped for the sake of brevity and reference is here made to that part of this brief wherein said specifications of error are set out. Also in the interest of brevity, reference is here made to the summary statement of the case contained in the Petition for Writ of Certiorari bound herewith.

As hereinbefore pointed out, no court of record, by a reported opinion, with the exception of the Court of Appeals in the instant case, has yet decided whether an insurer can and did make a clause or rider decreasing the benefits due under a policy of life insurance, or limiting the liability of the life insurance company, when such limitation was not applied for by the insured; much less, has it ever been decided, in any reported case, whether a life insurance company can make an aviation exclusion clause a part of a life

insurance policy under any circumstances. In view of the total absence of "horse cases" and in view of the rarity of "near horse cases", the decision and opinion of the Court of Appeals in the instant case is in conflict with the applicable Texas authorities on the broad proposition herein presented.

The Supreme Court of Texas in the case of GODDARD v. EAST TEXAS FIRE INS. CO., 67 Texas 69, 1 S.W. 906, said:

> "The clause which appellee seeks in this case to have construed as a part of the policy is not written or printed upon the same paper with the rest of the instrument, nor was it referred to in the policy (and interpolating, the application) as forming a part of the contract between the appellant and the insurance company. It is clear, therefore, that its conditions cannot be treated as entering into that contract, if it is to be considered as a separate and detached paper. But the edge of the paper upon which the clause is printed is made, by means of mucilage, to adhere to a blank space on the face of the policy, and upon this single fact rests the whole claim of appellee to have the clause considered as one of the warranties and conditions of that instrument."

So, in the GODDARD case the Supreme Court of Texas held that the so-called "Iron Safe Clause", even though attached with mucilage on the face of the policy offered the appellee insurance company no defense. After the decision in the GODDARD case the insurance companies began the practice of writing the description of the property insured on the same slip of paper with the "Iron Safe Clause" so that if such slip of paper were not considered a part of the policy there would be no description of the property insured, and, therefore, no insurance contract at all. This was the case in

HOME INSURANCE COMPANY OF NEW ORLEANS v. CARY, 31 S.W. 321, and in a number of other cases. To like effect see QUEEN INS. CO. OF AMERICA v. MAY, 35 S.W. 829, and CO-OPERATIVE INS. ASS'N OF SAN ANGELO, ET AL., v. RAY, 138 S.W. 1122. This line of cases has never been overruled and the rule of law so laid down has now become elementary.

True, the GODDARD case is a fire insurance case, rather than a life insurance case; also true, it is an old, rather than a recent, case; but the broad principle of law there laid down has never been overruled by a Texas court and has now become elementary; also, the question presented in the GODDARD case is more nearly the same as the broad question here presented than any reported case available to the attorneys involved in this case.

One of the last "life insurance cases" as that term is generally understood, decided by this Honorable Court is the case of STROEHMANN v. MUTUAL LIFE INS. CO. OF N. Y., 300 U.S. 435, 81 L. Ed. 732. Therein, this Hon. Court said:

> "No reason appears to doubt the power of the insurer to except from the ordinary Incontestibility clause all policy provisions relating to the Disability Benefits. But the petitioner maintains that the words used in the policy before us are inadequate definitely to disclose a purpose so to do. And we think the point is well taken."

Paraphrasing the above quotation to fit the facts of the case at bar, it is submitted that the Court would have said:

> "No reason appears to doubt the power of the insurer to issue a policy of insurance on condition that it contained as a valid and effective part thereof, an aviation exclusion clause. But petitioners maintain that

> the action taken by the insurer in an effort to do so are insufficient to accomplish such purpose in view of the provisions of the application and the policy provisions. And we think the point is well taken."

Later, in the STROEHMANN case, this Court said:

> "Without difficulty respondent could have expressed in plain words the exception for which it now contends, it has failed, we think, to do so. And applying the settled rule, the insured is entitled to the benefit of the resulting doubt."

Paraphrasing this quotation to fit the facts of the case at bar, it is submitted that the court would have said:

> "Without difficulty respondent could have made an aviation exclusion clause a part of the policy contract, as it now contends, by inserting in the application submitted to it by the insured, on respondent's form, in the space headed and entitled 'Additions or Amendments (For Home Office use only)' the words 'Issue subject to Aviation Exclusion Clause', or words to that effect. It (respondent) has failed so to do. And applying the settled rule, the insurer not having made an aviation exclusion clause a part of the policy in the manner provided by it when no aviation exclusion clause was applied for, the insured is entitled to the benefit of the resulting doubt and the aviation exclusion clause attempted to be made a part of the policy by the respondent was not made a part thereof and is not a part of the policy contract."

It is believed that the paraphrased quotations above would have been made in view of the well settled rule of law that an insurance contract will be construed most strongly against the insurer, in view of the policy provision quoted in the second and fourth specifications of error, and in

view of the provision in the application quoted in the first, second and third specifications of error (R. 24).

In view of the established rule of law above referred to, such quoted provision from the application means, as applied to the facts at bar,—that if the company does not issue a policy on the basis applied for (that is, without aviation exclusion clause) or at the company's published premium rates corresponding to applicant's age and classification (Mr. Walter C. Kennedy, the Vice President and Actuary of the respondent herein, testified, R. 168-171, particularly the last question on page 170 and answer on top of page 171) that the policy issued, and not considering the "Aviation Exclusion Clause" as a part thereof, was at the company's published premium rates corresponding to the applicant's age and classification) this application shall be for the plea (that is, to include an "Aviation Exclusion Clause) corresponding to the company's valuation of the risk, IF, and ONLY IF, the company shall so amend the application by inserting such amendment in the above space entitled 'Additions or Amendments' and then ONLY IF such change or amendment is ratified by the insured by the acceptance and receipt of the policy as so changed or amended.

The foregoing is the interpretation given by another insurer, Southwestern Life Insurance Company, to a very similar provision in its application (R. 134), where the insured did insert in the box "For Home Office Endorsement Only" the words "These policies contain partial Aviation Exclusion Riders."

In response to request made, the trial court directed that the original policy involved in this suit be sent up as part of the record to the Court of Appeals (R. 103). Motion is being made to the Court of Appeals that said original policy

be sent up to this Hon. Court as a part of the record, and it is contemplated that said Motion will be granted; and upon the assumption that the original policy will be available for inspection by this Hon. Court, it is requested and urged that reference be made to such original policy rather than to the record, for the provisions, form and make-up of the policy and application, especially the application.

It is submitted that the case of NEW YORK LIFE INS. CO. v. ROGERS, 126 F. (2d) 784, relied on so strongly by respondent below, and cited as authority by the Court of Appeals, is not in point on the facts of this case at all. Respondent, in the court below, merely and actually sought to take advantage of fortuitous circumstances that an aviation exclusion clause was mentioned in the Rogers case to show that the insurer had no defense by reason thereof, and the Hon. Court of Appeals fell into error in following the erroneous argument of the insurer in the instant case.

4. Argument is here submitted on the 7th specification of error. The Court of Appeals in its opinion held "that the insured met his death within the terms of the aviation exclusion clause (R. 218, 221) and further said: "we are not permitted to speculate and indulge unreasonable inferences in favor of plaintiffs as to how the insured met his death * * * ".

The stipulation as to the circumstances under which the insured met his death, shown on page 3 of the Petition for writ of certiorari (R. 80) is, in the final analysis, a stipulation that Roy Lee Smith is dead and that the cause of his death is not known by either party to the lawsuit. In view of the fact that this, and only this, is the import of the stipulation, it is submitted that the Court of Appeals did speculate and indulge unreasonable inferences in favor of respondent as to how the insured met his death.

The applicable local law on this point as laid down by the Texas courts is that the insurer has the burden of proof to show that the insured met his death by reason of some cause excepted from the general hazards insured against (if a cause was excepted). See 24 TEX. JURIS., Insurance, p. 1210, Section 361, also p. 1246, Section 388; HUTCHERSON v. SOVEREIGN CAMP W. O. W., 112 Tex. 551, 251 S.W. 491; GRAND FRATERNITY v. NELSON, 102 Tex. 401, 117 S.W. 788; HOME BENEFIT ASSOCIATION v. SARGENT, 142 U.S. 691, 35 L. Ed. 1161; EMPLOYERS LIABILITY ASSUR. CORP. v. ROCHELLE, 35 S.W. 869; SOVEREIGN CAMP W. O. W. v. DOUGLAS, 172 S.W. (2d) 982 (err. dism.).

Respondent offered *NO* evidence as to the cause of death of the insured but relied on the stipulation (R. 80) which is actually a conclusion of someone in the Navy Bureau of Navigation. The stipulation has not been attacked by respondent in any manner. The stipulation is not that Smith died as result of travel or flight in or upon an aircraft; it is not a stipulation that his death resulted directly from falling or otherwise descending therefrom or therewith; it is not a stipulation that Smith or anyone else was killed by a crash; it is not a stipulation that there was no possibility of survivors immediately after the plane touched the water; at best, from the standpoint of respondent, it is a stipulation that no survivors were found at the time search was made, and the search was probably made hours, or perhaps days, after the plane failed to return. It may be that minutes or hours, after the plane had safely landed an explosion resulted from an attempt to repair the plane, which killed those on board on the water; it may be that the plane landed in shark infested waters and that Smith and other personnel were killed by sharks or other marine life; it may be that Smith and other personnel were drowned,

or even starved to death, minutes, hours, or days after the plane had safely come to rest on the water. The testimony of G. W. Sheridan (R. 184-187) shows that any of those things are much more likely to have happened than that Smith and other personnel were dead before or at the time the plane contacted the water.

Thus, such holding of the Court of Appeals is in conflict with the applicable local law, in that the rule of law in Texas is that one relying on a stipulation cannot enlarge upon it or draw inferences from it. See 39 TEX. JURIS. 299 Stipulation, Section 19; STORK v. LEONARD, 212 S.W. 677; LINDSEY v. STATE, 194 S.W. (2d) 413; FIRESTONE TIRE & RUBBER CO. v. CHIPMAN, 194 S.W. (2d) 609; EXUM v. ALEXANDER, 207 S.W. (2d) 995 (err. ref.).

Also, in the case of BULL v. SUN LIFE INS. CO., 141 F. (2d) 456, 155 A.L.A. 1014, the Court held that the insured did not die "as a result directly or indirectly, of service, travel or flight in any species of aircraft" when the insured was on a Navy plane during World War II which was forced into the sea by damage but when the occupants were uninjured at the time and immediately after the plane landed on the water. The case at bar is a stronger one for the petitioners than was the BULL case, because in the BULL case the provision of the exclusion (which was undoubtedly a part of the policy) was that the insured should not be covered if death resulted *directly* or *indirectly* from travel or flight, etc., whereas the wording of the (very doubtful) exclusion in this case is "as a result of travel or flight, etc., and does not include the word "indirectly".

Conclusion

It is submitted that the questions herein involved are important ones, not just to the litigants, but to all of those

who are selling, buying, or covered by insurance of any type or character, and this covers a very large percentage of the nation's population; especially in view of the fact that this Honorable Court has been reticent if not derelict, in passing upon life insurance matters within the last number of years.

The opinion of the Court of Appeals, if allowed to stand, will establish a rule of decision for the Federal courts which is contrary to and out of harmony with the decisions of the state courts of Texas, other Federal courts and this Honorable Court.

WHEREFORE, it is respectfully submitted that this Honorable Court should grant the writ of certiorari, examine the questions presented, and thereafter reverse the decision of the Honorable Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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FILED
JUL 28 1950
CHARLES ELMORE CROP

Supreme Court of the United States

OCTOBER 1950 TERM

No. 173

RACHEL V. SMITH McDANIEL AND HER HUSBAND,
GEORGE M. McDANIEL *Petitioners*,

v.

CALIFORNIA-WESTERN STATES LIFE INSURANCE COMPANY,
Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

AND BRIEF IN SUPPORT OF SUCH REPLY

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REVISED CIVIL STATUTES OF TEXAS

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Respondent

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To the United States Court of Appeals
For the Fifth Circuit

AND BRIEF IN SUPPORT OF SUCH REPLY

To the Honorable Supreme Court of the United States:

Respondent, California-Western States Life Insurance Company, files this reply to the petition and brief of Petitioners for writ of certiorari.

Jurisdiction

There is no such case either of conflict or importance as justifies this Court in assuming jurisdiction, we submit.

The holding of the Court of Appeals does not present

the conflicts asserted. The facts are novel, and, while the holding of the Court of Appeals does not present any important question of law such as in any event to require this Court to grant the writ, still the holding is in keeping with the well established law of Texas.

In the first place, there is no question of construction presented. Hence, general rules of construction laid down in the cases of STROECHMANN v. MUTUAL LIFE INSURANCE CO., 300 U.S. 435, and BERGHOLM v. PEORIA LIFE INSURANCE CO., 284 U.S. 489, are in no wise disturbed. From Petitioners' viewpoint, the sole inquiry is whether the aviation exclusion rider is not a part of a contract binding Respondent.

Again, the case of GODDARD v. EAST TEXAS FIRE INSURANCE CO., 67 Tex. 69 (relied upon by the Petitioners here, as well as in the Court of Appeals), does not so support the position of the Petitioners that the aviation exclusion clause was not a part of the policy so as to bring about conflict. The rider in the GODDARD case—iron safe clause—was relied upon by the Insurance Company as constituting a warranty. The Court treated the rider as nothing more than a representation and as constituting none of the warranties. In respect of the clause as a warranty, it was characterized by the Supreme Court of Texas in part as follows:

> "It will be seen that the clause in question is inserted in the midst of a sentence with which it has no proper connection; a sentence which purports to contain the promises made on the part of the insurance company and not those entered into by Goddard and Corley. It is therefore not only out of place, but, taken in connection with its context, is devoid of meaning. Not only so, but the policy expressly names the conditions and terms upon which it is executed, and the warranties which the assured is obligated to make good and per-

> form, yet no warranty or condition of the kind stated in the clause is found among them."

(See also the characterization thereof by JUDGE WILLIAMS, afterwards of the Supreme Court of Texas, in HOME FIRE INSURANCE CO. v. CAREY, 31 S.W. 321, where the rider was regarded as a part of the policy.)

The aviation exclusion clause here was bound in as a part of the body of the policy and characterized in the same fashion as were two other so-called riders so bound, to wit: first, the "Family Income Rider," which provides for the payment of $102.00 per month for a period of 20 years, with the basic face of the policy, $5105.00, paid in addition at the end of that term, and of which Petitioners seek recovery; the second, the "Special Service Men's Benefit," dealing with payments on proof of death by military authority. All these three so-called riders expressly identify themselves as forming a part of Policy No. 576939 (the number of the policy on its face) to which they were attached. (See AMERICAN NATIONAL INSURANCE CO. v. THOMPSON, 186 S.W. 254.)

Manifestly, the holding here that the aviation exclusion clause was meaningful and a part of the policy, as it states, in no wise conflicts with the holding of the Texas Supreme Court in the GODDARD case.

For a statement as to the correctness of the holding of the Court of Appeals, we set forth a:

Brief Summary of the Evidence

The insured, Roy Lee Smith, was an enlisted aviation ma-

chinist mate, at the Naval Air Base in Corpus Christi, Texas, and as such was required to make certain aerial flights. The application states that he had made 30 during the 12 months preceding and that 25 were contemplated during the next succeeding 12 months. The insurance applied for was the, "Amount $20.00 a month will buy." The soliciting agent taking the application was one Matthews. (See appendix as to the statute limiting his authority.) In transmitting the application to the Home Office, Matthews directed as follows:

> "Date for Government allotment. Issue with Aviation Exclusion Rider."

The application, being received at the Home Office in Sacramento, California, was approved with the notation,

> "Aviation Exclusion Clause to be signed before delivery of policy." (R. 210.)

In light of the fact that the policy was issued with this exclusion clause as a part thereof, the insurance was greater in amount than would have been the case had the policy been issued without the aviation exclusion clause. Put otherwise, $20.00 a month would have bought a smaller policy had the Company assumed this particular aviation risk. The basic face of the policy, calculated on the then rates of the Respondent, with the aviation exclusion rider included as a part of the policy, was $5105.00. Had no aviation exclusion rider been included, so that the Company would have assumed the risks incident to aviation, the basic policy would have amounted to only $3267.00 (R. 166). As a result, also, the monthly income of $102.00, under Family Income Rider would have been reduced below that amount.

The policy, including the several riders attached, after being prepared and bound at the Home Office, was sent to Matthews for delivery. Among the riders so attached and bound was the "Aviation Exclusion Clause"—characterized such in bold type. An extra copy of this clause was also sent to Matthews. He was directed in the writing of transmittal to secure Smith's signature to both copies, namely, to the one attached to the policy and to the extra copy, the latter to be returned to the Company. Smith did sign the extra copy and same was forthwith returned to the Company by Matthews. The signature of Smith does not appear on the rider attached to the policy. The Company had no knowledge of this fact until after the death of Smith, namely, at the time the Company tendered the amount which was due in light of the terms of the aviation exclusion rider (R. 165).

Certain oral evidence was offered by the Petitioner, having to do with a conversation between Matthews and one Whitten, brother-in-law of Smith, had in the presence of Smith, at the time the application of Smith was taken (R. 127-129). The Trial Court for the moment admitted this but later refused to give it consideration (R. 88). As Respondent construes this evidence, it would be helpful to Respondent.

Matthews also procured from Smith a receipt for the policy wherein he, Smith, stated that he accepted same and that he had filed for Government allotment to pay the premium on the policy on a monthly basis. This receipt, bearing the admitted signature of Smith, is found in the Record at page 196. It was dated March 27, 1947. The policy became effective, however, on April 10, 1947, being the date the Home Office received the first monthly payment from the Government.

Matthews testified also that in the transaction which occurred between him and Smith at the time of the delivery of the policy (see his testimony in full in the Record at page 137 to 158) he went over the policy, including the aviation exclusion clause, with Smith; that he procured the signature of Smith to the copy of said clause which was returned to the Company; that he, Matthews, physically turned the policy, including all the several riders forming a part thereof, over to Smith. The Trial Court gave consideration to all this, but the Appellate Court apparently thought some, if not all, of it not admissible. If there be any error on the part of the Appellate Court in this particular, manifestly it harms the Respondent, not the Petitioners. No such error is assigned in the Petition.

Smith kept the policy in his suit case at Corpus Christi for two or three weeks and then took it to his home town for safe keeping (R. 121-2). Smith was killed April 25, 1948.

COUNTER-POINTS IN SUPPORT OF THE JUDGMENT

First

The Courts, trial and appellate, correctly held the Aviation Exclusion Clause to be a part of the policy.

Second

If it should appear that Smith did not accept the Aviation Exclusion Clause as a part of the policy contract, there was no contract.

Third

The Courts below correctly held that Smith's death was within the exclusion.

Brief of Argument Under First Counter-Point

It is the established law of Texas that there is a duty upon the part of the insured to satisfy himself that the policy delivered is in keeping with his understanding. In addition to the case of MORRISON v. INSURANCE CO., 69 Tex. 353, cited in the opinion of the Court of Appeals, see the statement of JUDGE LEE speaking for the Fifth Circuit in NEW YORK CASUALTY COMPANY v. FORD, 145 Fed. (2d) 599, 600, and the authorities there cited, to the effect that:

> "It is well established in Texas that an insured must refuse to accept a policy which is not in accordance with the representations made by the agent. If he accepts the policy and retains it, whether he reads it or not, he is bound by its terms."

For additional cases see HOME INSURANCE CO. v. BENNETT, 9 S.W. (2d) 432; PRUDENTIAL INSURANCE CO. v. HOWELL, 119 S.W. (2d) 1100; EQUITABLE INSURANCE CO. v. JOHNSON, 81 Fed. (2d) 543. One who retains a deed or contract, for instance, is bound thereby. JOHNSON v. TUNSTILL, 25 S.W. (2d) 828 (Com. App.), and cases cited.

Aside from this rule of law, the facts show assent to the rider at least sufficiently to justify the findings below.

The several writings tendered as a policy when handed to Smith were all bound together. Necessarily he understood that all of them, and not part of them merely, were being delivered as the insurance policy. The aviation exclusion

clause, though not signed by Smith, was attached. Detachment, or some form of mutilation, would have been normal to evidence non-acquiescence. Under the provisions of Article 5063 of the REVISED CIVIL STATUTES OF TEXAS, a soliciting agent, such as Matthews "shall not have power to waive, change or alter any of the terms or conditions of the application or the policy." There is no suggestion that Matthews actually undertook to deliver anything less than all of the writings, so bound together, as the policy contract.

The writings intrusted to him, being bound together, negatived apparent authority to deliver less than all. This is aside from the fact that the statute deprived him of any real or apparent authority. Smith signed a receipt showing that he accepted the policy. Both this receipt and a copy of the aviation exclusion clause signed by him were sent to the Company. Smith lived for 13 months after the delivery of the policy. Premiums were continued to be paid, and no prior contention was made that there was any spurious writing accompanying the policy. The request that Smith sign the copy of the aviation exclusion clause attached to the policy was to furnish indisputable evidence of his assent thereto. See NEW YORK LIFE INSURANCE CO. v. ROGERS, 126 Fed. (2d) 784. His assent was manifested not only by the retention of the policy but by the execution of the receipt unequivocally accepting same and by the transmittal of the signed copy of the rider to the Company through Matthews.

The making of riders parts of policies is well recognized—almost universal. Among other cases, see the case of SOUTHLAND LIFE INSURANCE COMPANY v. GATEWOOD, 135 Tex. 177, 141 S.W. (2d) 588, wherein the Commission of Appeals, speaking through the now Chief Justice of Texas Su-

preme Court, referred to the fact that, "The rider was a part of the policy."

Brief of Argument Under the Second Counter-Point

A policy of insurance is a contract, and, like other contracts, requires a meeting of the minds of the parties. SOUTHLAND LIFE INSURANCE CO. v. VELA, 147 Tex. 478, 217 S.W. (2d) 660; SOUTHLAND LIFE INSURANCE CO. v. STATTER, 139 Tex. 496, 163 S.W. (2d) 623. The Company manifestly intended to issue a policy with the aviation exclusion rider as a part thereof, as evidenced not only by the difference in premiums but as well by the request of Matthews that it be so issued, the approval of the application on such a basis, the attachment of the rider bound with the other writings constituting the policy, and the direction that the rider be signed and that the extra copy signed be transmitted to the Company. The intent was unmistakable by the inclusion of the aviation exclusion rider along with the riders bound in similar form and similarily characterized as parts of the policy. There was nothing in fact and nothing in appearance which justified Smith in assuming that he had a right to accept something less than all of what was tendered. And, as above set forth, there was nothing which gave to Matthews the appearance of having authority to deliver less than all of the writings so bound together. For instance, had Matthews (having no power to contract), at the request of Smith, detached the aviation exclusion rider, would there have been a contract? Or had the rider been marked "void," would there have been a contract? If it then be argued that Smith accepted the policy except the aviation exclusion clause, the argument is fruitless since he could not do so and yet claim that such agreement bound the Company, as the Company had tendered only a policy with

the exclusion rider as a part thereof. Furthermore, the premium paid is not that of the policy sued upon, i.e., one omitting the aviation exclusion clause. On this question see the opinion of JUDGE HUTCHESON in PEET v. PEORIA LIFE INSURANCE CO., 16 Fed. (2d) 928, which is quite similar in point of fact.

Brief of Argument Under the Third Counter-Point

The stipulation shows that the airplane in which Smith was riding crashed with such impact as to completely disintegrate. This was manifested by the search instituted by both surface and air craft immediately thereafter. The impact was of such quality that, "There was no possibility of survivors." While still enlisted, Smith was at sea in a plane flown from a carrier which was engaged in simulated attack.

The aviation exclusion clause excepted death as a result of an aviation accident other than one wherein the assured was a passenger on a regularly scheduled and established air route. There was included death resulting from falling from or with air craft.

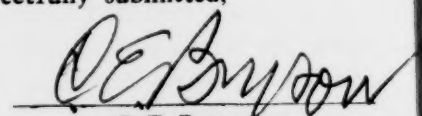
Conclusion and Prayer

This case was tried before the District Judge who saw the witnesses and believed in the integrity of Matthews. (See Record, pp. 85, 88, 90 and 92.) It has been affirmed by the Court of Appeals, which found that there was no fraud or overreaching. Smith accepted and retained the several writings bound together, inclusive of the three riders, all of which upon their face stated that they were parts of the contract. Unfortunately Smith died as a result of an exclusion which the parties contracted in the beginning would

render the Company liable for only the return of the premiums with interest. These have been paid into court.

Respondent prays that the application be denied. In the event the writ be granted, Respondent reserves the right to file a more extended brief.

Respectfully submitted,



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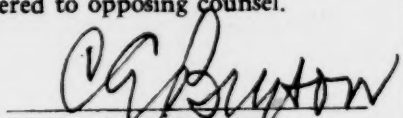
I hereby certify that copies of the foregoing Reply of Respondents have been delivered to opposing counsel.



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APPENDIX

Vernon's Civil Statutes of the State of Texas Annotated, Vol. 14, p. 708:

Art. 5063. 4968 *Solicitor deemed company's agent*

Any person who shall solicit an application for insurance upon the life of another shall in any controversy between the assured and his beneficiary and the company issuing any policy upon such application be regarded as the agent of the company, and not the agent of the insured, but such agent shall not have the power to waive, change or alter any of the terms or conditions of the application or policy. Acts 1909, p. 192.